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No. -

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALASKA NORTHERN DEVELOPMENT INC.,
AN ALASKAN CORPORATION, *Petitioner,*

v.

ALYESKA PIPELINE SERVICE COMPANY,
A DELAWARE CORPORATION, *Respondent.*

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

BURR, PEASE & KURTZ
810 N Street
Anchorage, Alaska 99501
By: Charles P. Flynn
Counsel for Respondent

November 18, 1983

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I. SUMMARY OF OPPOSITION

Petitioner, Alaska Northern Development, Inc. (AND), brought suit against Alyeska Pipeline Service Company (Alyeska) in the Alaska state courts, alleging the existence of a contract between the parties and Alyeska's breach of that contract. AND lost its case before a state trial court and again on appeal to the Supreme Court of the State of Alaska. No issues of federal law, either statutory or constitutional, were ever raised or briefed by the parties or passed upon by the state courts. This Court is therefore without jurisdiction to review the "federal questions" manufactured by AND for purposes of its Petition. Moreover, viewed on their merits, the issues of state constitutional and evidentiary law raised here by AND were properly decided by the Alaska Supreme Court.

II. STATEMENT OF FACTS

In November, 1976, David Reed, a principal of AND, began inquiries in Fairbanks regarding a possible purchase by AND of equipment and materials left over from construction of the Trans Alaskan Pipeline System (TAPS). Tr., pp. 1166-68, 1176-77, 3408-09. Reed had a number of discussions with Alyeska personnel, who informed him that any proposed purchase of surplus materials was subject to prior review by Alyeska's Owner Committee, consisting of representatives of each of the companies participating in the TAPS project. Tr., pp. 1331-33, 1352-53, 1362-63, 1371, 2036, 3419-22.

In early December, Reed suggested that his tentative discussions with Alyeska personnel be reduced to writing so that he would have something to show to his fellow shareholders and alleged financial backers to prove that he was indeed engaged in serious negotiations. Tr. pp. 1178, 3434. Alyeska personnel, in return, informed Reed that they wanted something in writing that could be presented to Alyeska's management and the Owner Committee for review, to determine whether Alyeska had any real interest in pursuing a contract with AND on the terms suggested by Reed. Tr., p. 3429.

Reed submitted to Alyeska a letter, which he termed a "draft" of a contract for the purchase of Alyeska's "inven-

tory of Caterpillar parts." Tr. pp. 1430-31. Alyeska personnel drafted a response, which included this language:

> You request a first right of refusal to purchase these items and request a letter of intent from Alyeska so stating. Please consider this as said letter of intent, *subject to the final approval of the Owner Committee.* [Emphasis added.]

Appendix B, p.1. The Owner Committee met on March 10, 1977, and decided against approving any agreement with AND. *See* Exhibit 30, 142.

AND sued Alyeska, claiming a breach of contract. After extensive discovery and motions for summary judgment by each side, the State Superior Court determined, as a matter of state law, that Alyeska was entitled to summary judgment on AND's claim for breach of contract on the basis of the December 11 letter. However, the court ordered a trial on the issue of reformation, reasoning that AND should have the opportunity to present evidence that the December 11 letter, and specifically the Owner approval term, was improperly memorialized. The reformation action, equitable in nature, was tried to the court without a jury in January and February, 1981.

At the close of trial, the Superior Court denied reformation. AND appealed to the Alaska Supreme Court, which affirmed the trial judge's findings and grant of summary judgment in all respects. *Alaska Northern Development Inc. v. Alyeska Pipeline Service Company,* 666 P.2d 33 (Alaska 1983). AND has now petitioned this Court to grant certiorari to review the decision of the Alaska Supreme Court.

III. ARGUMENT

A. THE JURY ISSUE

1. AND Did Not Assert a Federal Right to Jury Trial in the State Court

In the State proceedings, AND never asserted a *federal* right under the Seventh Amendment to a jury trial on the issue of contract reformation. Perhaps AND's oversight was due to its familiarity with the fundamental principle of constitutional law ". . . that the Seventh Amendment applies only to

proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials by jury in state courts, or the standards which must be applied concerning the same." *Minneapolis and St. Louis Railroad Co., v. Bombalis,* 36 S.Ct. 595, 596, 241 U.S. 211, 217, 60 L.Ed 961 (1916); *see also Hardware Dealers' Mutual Fire Insurance Co. of Wisconsin v. Glidden Company,* 284 U.S. 151, 158, 52 S.Ct. 69, 71, 76 L.Ed. 214 (1931). AND has ignored this principle in its attempt to create a federal question for purposes of certiorari.

AND asserts that "where a State construes its constitution in accordance with the federal Constitution this Court will analyze the result to assure conformity with federal guarantees," citing *South Dakota v. Neville,* 103 S.Ct. 916, 919 n. 5 (1983). *Neville* does not support that proposition and is easily distinguishable. First, and most obviously, the federal issues were raised in the state courts in *Neville.* In this case only state issues were raised in the state courts. Second, assumption of jurisdiction in *Neville* turned on a determination that all significant analysis in the state courts involved the federally guaranteed right, and that the determination of state rights in the state court would follow the determination of federal rights. *Id.* at 103, S.Ct. 919 n. 5. In this case, no federally guaranteed right was analyzed or ruled upon by the state courts, because none was raised by AND. 666 P.2d at 40.

AND's arguments in the Alaska courts were restricted to Article I, Sec. 16, of the Alaska Constitution. In the trial court, AND filed a "Memorandum in Support of Motion to Confirm Plaintiff's Demand for a Jury Trial" on December 16, 1980 (R.4737), in which it relied completely on the Alaska Constitution, citing federal cases only for their interpretive guidance. AND's State Supreme Court briefs, likewise, while noting that the Alaskan constitutional provision regarding civil juries "is similar to the Seventh Amendment of the United States Constitution," argued exclusively a *state* constitutional right to a jury trial. Appellant's Brief (Alaska Supreme Court, Case No. 6353) p. 69. The Alaska Supreme Court thus noted in its opinion, "AND contends that it was entitled to a jury trial *under article I, sec. 16 of the Alaska Constitution.*" 666 P.2d at 40 (emphasis added). The Alaska Supreme Court's failure

to consider a *federal* right to a jury trial, alone, creates a presumption that AND failed to raise the issue below:

> This Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this court can affirmatively show the contrary." *Street v. New York,* 394 U.S. 576, 582, 89 S.Ct. 1354, 1360, 22 L.Ed. 2, 572 (1969).

Webb v. Webb, 101 S.Ct. 1889, 1891, 451 U.S. 493, 495-96, 68 L.Ed.2d 392 (1981).

AND makes an awkward attempt at compliance with Supreme Court Rule 21.1(h), which requires a petition for certiorari to specifically identify where the federal question was raised and ruled upon in the state court proceedings. AND cites in passing to "TR 5431-47," which it claims demonstrates where "the deprivation of petitioner's constitutional right of a jury trial was promptly raised." Petition for Certiorari, p.6. In actuality, the cited pages are an excerpt from the trial court's oral decision ordering a trial on the reformation issue, in which the judge announced his holding that *state* law did not require a jury trial on the issue of contract reformation. The trial court, like the Alaska Supreme Court and AND itself, discussed federal Seventh Amendment case law only to support its interpretation of the similar Alaska constitutional provision. AND *never* "timely and properly raised" a federal question as required by Rule 21.1(h).

The consequence of AND's failure to raise a federal issue below is that this Court lacks jurisdiction to consider its Petition for Certiorari. *Webb, supra,* 101 S.Ct. at 1892, 451 U.S. at 496-97; *Tacon v. Arizona,* 93 S.Ct. 998, 999, 410 U.S. 351, 352, 35 L.Ed.2d 346 (1973); *Cardinale v. Louisiana,* 89 S.Ct. 1161, 1162-63, 394 U.S. 437, 438, 22 L.Ed.2d 398 (1969).

What AND *did* raise below, as demonstrated above, was a right asserted under the Alaska Constitution, Article I, Sec. 16. The State Supreme Court thoroughly considered AND's argued application of the Alaska Constitution and rejected it. 666 P.2d at 40-41. AND's claim that the Alaska Supreme

Court's holding in this case is inconsistent "with its own decision in *Shope v. Sims*, 658 P.2d 1336 (Alaska 1983)" (Petition, p.11) does not even facially present a federal question. This Court has often emphasized the finality of a state court's interpretation of state statutes and constitutional provisions, *Brown v. Ohio*, 87 S.Ct. 2221, 2226, 432 U.S. 161, 167, 53 L.Ed.2d 187 (1977); *Garner v. Louisiana*, 82 S.Ct. 248, 254, 368 U.S. 157, 169, 7 L.Ed.2d 207 (1961), and has recently noted that states are free to interpret their own constitutions differently from the federal Constitution. *Connecticut v. Johnson* 103 S.Ct. 969, 974 n. 9 (1983). The Alaska Supreme Court has interpreted and applied the Alaska Constitution in this case, and this Court lacks jurisdiction to review its decision.

2. On Its Merits, AND's Jury Trial Issue Was Properly Decided By The Alaska Supreme Court

On its merits, AND's claim to a jury trial on the issue of contract reformation was decided correctly by the Alaska Supreme Court. The only issue under consideration at the trial in this case was whether the correspondence of the parties should be reformed consistent with AND's contentions. Reformation, under both Alaskan and federal law, is an equitable action to be tried to the court sitting without a jury. *See* 9 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* (1971) §2316, at pp. 82-83. If the trial court had ordered reformation at the close of the trial, only then would AND have had a right to have a jury decide whether a contract existed, or was breached. Thus, as the Alaska Supreme Court held, "[b]ecause the Superior Court refused to reform the contract, a ruling that AND does not contest, AND has no legal claim to present to a jury." 666 P.2d at 41. As the Alaska Supreme Court properly held in *Shope, supra* at 1340, it is only where there are factual issues *common* to both the legal and equitable claims that those issues must be tried to a jury. In this case there were no legal issues for presentation because all legal claims had been dismissed, and because no factual determinations in the reformation trial would bind AND in any subsequent jury trial.

B. THE EVIDENTIARY ISSUE

1. This Court Lacks Jurisdiction to Consider AND's Evidentiary Issue

AND's other supposedly "federal" question, succinctly stated, is whether the state trial court's refusal to admit certain impeachment evidence "deprived the petitioner of a trial on the merits." Petition, p. i. AND attempts to give this state law evidentiary issue a "federal question" aura by citing to the Federal Energy Policy and Conservation Act, 15 U.S.C §757, an alleged violation of which AND sought to prove on cross-examination at the reformation trial.[1] The Superior Court excluded the evidence on the basis of Alaska Evidence Rule 403, which permits the exclusion of evidence, even if relevant, "if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The Alaska Supreme Court affirmed the trial court's evidentiary ruling. 666 P.2d at 42.

AND states no federal question based on the trial court's application of Alaska's evidence rules. That the proffered impeachment evidence involved a purported violation of a federal statute does not bootstrap the evidentiary ruling into the federal arena. On the contrary, a state "is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Marshall v. Lonberger*, 103 S.Ct. 843, 851 n. 4 (1983), quoting *Snyder v. Massachusetts*, 54 S.Ct. 330, 332, 291 U.S. 97, 105, 78 L.Ed. 674 (1934). The discretionary evidentiary ruling of the state trial court in this case, affirmed on appeal to the Alaska Supreme Court, has no federal dimension whatsoever.

AND does not even attempt to comply with this Court's Rule 21.1(h), which requires a petitioner to specify the stage

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[1] AND did not plead a cause of action based upon this or any other federal statute.

in the proceedings and the manner in which the federal questions were raised and to show "the way in which they were passed upon by the [state] court." AND has never before claimed that the trial court's exclusion of the proffered impeachment evidence deprived AND of some *federal* right, and this Court therefore has no jurisdiction to review such a claim. *Webb v. Webb*, 101 S.Ct. 1889, 1891, 451 U.S. 493, 494-96, 68 L.Ed.2d 392 (1981); *Cardinale v. Louisiana*, 89 S.Ct. 1161, 1162, 394 U.S. 437, 438, 22 L.Ed.2d 398 (1969).

2. On Its Merits, the Evidentiary Issue Was Properly Decided By The Supreme Court

AND's "tariff conspiracy" theory was a red herring and nothing more, certainly not a substantial question for this Court's review. It had no basis in fact, but depended on the Court's acceptance of a contorted syllogism: AND argued that Alyeska eventually made less money on sales of surplus equipment than it might have made under AND's "contract," thereby increasing the net cost of the pipeline; that by so doing Alyeska had, by virtue of some purported tariff "formulae," incredibly transformed these higher costs into bigger profits; and that Alyeska, therefore, must have conspired to decrease profits from surplus sales in order to defraud American consumers, breaching AND's contract along the way.

The "evidence" of this conspiracy theory was initially offered to support AND's claim for punitive damages for Alyeska's alleged breach of contract. The Alaska Supreme Court affirmed the trial court's grant of summary judgment on AND's punitive damages claim based on AND's failure to present even a prima facie case under Alaska law. The Court held that AND's failure after voluminous discovery to present any evidence of a conspiracy, or that it was directed at AND, barred the claim for punitive damages. 666 P.2d at 41.

AND then sought to introduce its "tariff conspiracy" theory into the reformation trial as impeachment on the cross-examination of George Nelson, one of Alyeska's officers. The evidence was allegedly offered "to impeach his credibility on the issue of when he first knew of the December 11 letter."

Petition, p. 8. However, as is evident from the hyperbolic ramblings in AND's petition regarding "Alyeska's mammoth tariff-manipulation fraud on American consumers and taxpayers" (p. 10; *see* pp. i, 7-8, 9-10, 14), AND wished to do considerably more with the excluded evidence than prove the extent of Nelson's knowledge on a particular date: it wished to turn a simple reformation trial into a witch hunt. Under these circumstances, as the Alaska Supreme Court held, the trial court properly excluded the evidence under Alaska Evidence Rule 403 due to "considerations of undue delay [and] waste of time." 666 P.2d at 42.

IV. CONCLUSION

AND has never before asserted a "federal question," and this Court therefore lacks jurisdiction to consider its claims. Moreover, AND's purported "federal questions" are not "federal" at all, but matters of state constitutional and evidentiary law properly left to the courts of the State of Alaska. Finally, those matters were clearly decided correctly by the Alaska courts and therefore present no substantial questions for this Court's review.

DATED this 18th day of November, 1983.

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By: _____
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APPENDICES

APPENDIX A

ALASKA RULES OF EVIDENCE Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

UNITED STATES CONSTITUTION. Amendment VII. Trial by jury in civil cases.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

ALASKA CONSTITUTION, Art. I, § 16. Civil Suits; Trial by Jury.

In civil cases where the amount in controversy exceeds two hundred fifty dollars, the right of trial by a jury of twelve is preserved to the same extent as it existed at common law. The legislature may make provision for a verdict by not less than three-fourths of the jury and, in courts not of record, may provide for a jury of not less than six or more than twelve.

RULES OF THE SUPREME COURT Rule 21. The Petition for Certiorari.

.1. The petition for writ of certiorari shall contain, in the order here indicated:

(h) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such

pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g. ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

Where the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(k) of this Rule.

APPENDIX B

December 11, 1976

Mr. David Reed, President
Alaska Northern Development, Inc.
P.O. Box 60124
Fairbanks, Alaska 99706

Subject: Letter of Intent for Purchase of Alyeska's Entire Caterpillar and other Spare Parts Inventory

Dear Mr. Reed:

This will acknowledge your letter of intent dated December 10, 1976, advising that A.N.D., Inc. is willing to purchase the entire Alyeska inventory of Caterpillar and other major supplier and associated supplier parts including tools. You request a first right of refusal to purchase these items and request a letter of intent from Alyeska so stating. Please consider this as said letter of intent, subject to the final approval of the owner committee.

A.N.D., Inc. is hereby granted the sole and exclusive first right of refusal to purchase the entire Alyeska inventory of Caterpillar and other major supplier and associated supplier spare parts and tools from the Alyeska Pipeline Project. The terms and conditions upon which this letter of intent is issued are as follows:

(1) That the uniform purchase price for Caterpillar parts, whether new, used, refurbished, replaced, rusted, and scrap shall be 65 percent of the cost to Alyeska one year ago, based on Caterpillar's lower 48, FOB stateside list prices.

(2) In the case of Cummins Northwest, only, A.N.D., Inc. is granted a second right of refusal as to that company when said company does not exercise its first right of refusal.

(3) A.N.D., Inc. will furnish the crating material for the shipment of parts when additional protective crating

is needed over the present Alyeska packaging. A.N.D., Inc. will assign personnel to work with Alyeska personnel in inspecting and preparing shipments.

(4) A.N.D., Inc. will furnish transportation from Alyeska storage areas and will be afforded a reasonable length of time, without cost for storage, to remove the said parts for shipment. A.N.D., Inc. has the right to inspect parts on site.

(5) A.N.D., Inc. will take any size shipment during each month, or such earlier or later times as mutually agreeable between the parties.

(6) A.N.D., Inc. will provide Alyeska with an irrevocable revolving letter of credit stipulating therein that funds are available at the National Bank of Alaska, main office in Anchorage, to pay the purchase price of all said parts. Before shipment is made, funds covering the purchase price will be released by National Bank of Alaska from said line of credit and credited to Alyeska's account upon receipt by the bank of notification from Alyeska and A.N.D., Inc. certifying shipment is ready to be made. Alyeska understands that A.N.D., Inc. is relying upon this letter of intent to obtain a major portion of its financing and Alyeska in good faith intends to enter into a written contract with A.N.D., Inc. embodying the provisions of this letter of intent within a reasonable period of time hereafter.

Yours truly,

William M. Rickett
Manager of Contracts
and Materials Management

WMR/ew